

PUBLIC WORKS & UTILITIES COMMITTEE


13-0086R

RESOLUTION AUTHORIZING AN AGREEMENT WITH THE DULUTH TRANSIT AUTHORITY AND THE MINNESOTA DEPARTMENT OF TRANSPORTATION FOR THE RECONSTRUCTION OF THE NORTHWEST PASSAGE SKYWALK.

CITY PROPOSAL:

RESOLVED, that the proper city officials are hereby authorized to enter into cooperative construction agreement no. 02299, a copy of which is on file in the office of the city clerk as Public Document No. _____, with the Duluth Transit Authority and the Minnesota Department of Transportation to provide for state oversight engineering, operation and maintenance for the reconstruction of the Northwest Passage Skywalk (Bridge No. 69509) over Interstate Trunk Highway No. 35 at Third Avenue West within the corporate limits of the city of Duluth, state project no. 6982-312, and city project no. 1204.

Approved:




Department Director

Approved for presentation to council:




Chief Administrative Officer

Approved as to form:



Attorney

Approved:



Auditor

ENG CJV:jh 2/11/2013

STATEMENT OF PURPOSE: This resolution will authorize the reconstruction of the Northwest Passage Skywalk by the Duluth Transit Authority, at its cost. The agreement also authorizes the state to provide oversight for the bridge portion of the skywalk over I35. Upon completion of the bridge and acceptance by the city, the city will be responsible for the operation, maintenance, repair and future replacement.

STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION
And
DULUTH TRANSIT AUTHORITY
And
CITY OF DULUTH
COOPERATIVE CONSTRUCTION
AGREEMENT

State Project Number (S.P.):	<u>6982-312</u>	Original Amount Encumbered
Trunk Highway Number (T.H.):	<u>35=395</u>	<u>\$0.00</u>
DTA Project Number:	<u>010-12-0043.3</u>	
Bridge Number:	<u>69509</u>	

This Agreement is between the State of Minnesota, acting through its Commissioner of Transportation ("State") and the Duluth Transit Authority acting through its Board of Directors ("DTA") and the City of Duluth acting through its City Council ("City"). For the purposes of this Agreement, the term ("Owner") will mean DTA and City acting together under this Agreement.

Recitals

1. DTA, in conjunction with the City, will be constructing a Multimodal Transportation Center. As a part of the contract for design and construction of said Center, the City, acting in conjunction with DTA, will cause the reconstruction of the Northwest Passage Skywalk (Bridge No. 69509) crossing Interstate Trunk Highway No. 35 at 3rd Avenue West in the City of Duluth according to plans, specifications and special provisions designated as DTA Project No. 010-12-0043.3 and by the State as State Project No. 6982-312 (I-35=395) ("Project"). Said plans, specifications and provisions for the Bridge No. 69509 portion of the Project will be prepared in accordance with the directions of the Owners, the State and the Federal Transportation Agency; and
2. Owners will be in control of those aspects of the Project related to the design and construction of Bridge No. 69509 and will be responsible to the State therefor. Upon completion, the City will own, operate, inspect, maintain and repair Bridge No. 69509; and
3. The State will retain its existing trunk highway right-of-way under the Northwest Passage Skywalk (Bridge No. 69509) including the air rights. The State retains its authority to administer, issue, and regulate access permits, sign advertising permits, drainage permits, and permits to install new utilities on the trunk highway right-of-way; and
4. Since a portion of the Project is on the National Highway System right-of-way, the State will perform oversight engineering of that portion of the Project in connection with the construction as required by the Stewardship Plan between the FHWA and the State, dated December, 2007, to ensure that the Federal highway program is delivered consistent with applicable laws, regulations, and policies and any construction activity undertaken on or affecting the Trunk Highway system is designed and constructed in accordance with the laws and rules of the State of Minnesota and policies of the Department of Transportation; and
5. Minnesota Statutes § 161.20, subdivision 2 authorizes the Commissioner of Transportation to make arrangements with and cooperate with any governmental authority for the purposes of constructing, maintaining and improving the trunk highway system.

Agreement

1. Term of Agreement; Survival of Terms

- 1.1. **Effective date.** This Agreement will be effective on the date the State obtains all signatures required by Minnesota Statutes § 16C.05, subdivision 2.

- 1.2. **Expiration date.** This Agreement will expire when all obligations have been satisfactorily fulfilled.
- 1.3. **Survival of terms.** All clauses which impose obligations continuing in their nature and which must survive in order to give effect to their meaning will survive the expiration or termination of this Agreement, including, without limitation, the following clauses: 2.4. State Ownership of Improvements; 7. Operation and Maintenance by the City; 8. Inspection and Maintenance by the State; 11. Liability; Worker Compensation Claims; Insurance; 13. State Audits; 14. Government Data Practices; 15. Governing Law; Jurisdiction; Venue; and 17. Force Majeure.

2. Right-of-Way Use

- 2.1. **Limited Right to Occupy.** The State grants to the City (and its contractors and consultants) the right to occupy trunk highway right-of-way as necessary to perform the work described in the Project Plans. This right is limited to the purpose of constructing the Project, and administering such construction, and may be revoked by the State at any time, with or without cause. Cause for revoking this right of occupancy includes, but is not limited to, breaching the terms of this or any other agreement (relevant to this Project) with the State, failing to provide adequate traffic control or other safety measures, failing to perform the construction properly and in a timely manner, and failing to observe applicable environmental laws or terms of applicable permits. The State will have no liability to the City (or its contractors or consultants) for revoking this right of occupancy.
- 2.2. **State Access; Suspension of Work; Remedial Measures.** The State's District Engineer or assigned representative retains the right to enter and inspect the trunk highway right-of-way (including the construction being performed on such right-of-way) at any time and without notice to the City or its contractor. If the State determines (in its sole discretion) that the construction is not being performed in a proper or timely manner, or that environmental laws (or the terms of permits) are not being complied with, or that traffic control or other necessary safety measures are not being properly implemented, then the State may direct the City (and its contractor) to take such remedial measures as the State deems necessary. The State may require the City (and its contractors and consultants) to suspend their operations until suitable remedial action plans are approved and implemented. The State will have no liability to the City (or its contractors or consultants) for exercising its rights under this provision.
- 2.3. **Traffic Control; Worker Safety.** While the City (and its contractors and consultants) are occupying the State right-of-way, they must comply with the approved traffic control plan, and with applicable provisions of the Work Zone Field Handbook (<http://www.dot.state.mn.us/trafficeng/workzone/index.html>). All City, contractor, and consultant personnel occupying the State's right-of-way must be provided with required reflective clothing and hats.
- 2.4. **State Ownership of Improvements.** Excluding the Northwest Passage Skywalk (Bridge No. 69509), the State will retain ownership of its trunk highway right-of-way, including any improvements made to such right-of-way under this Agreement, unless otherwise noted. The warranties and guarantees made by the City's contractor with respect to such improvements (if any) will flow to the State. The City will assist the State, as necessary, to enforce such warranties and guarantees, and to obtain recovery from the City's consultants and contractor (including its sureties) for non-performance of contract work, for design errors and omissions, and for defects in materials and workmanship. Upon request of the State, the City will undertake such actions as are reasonably necessary to transfer or assign contract rights to the State and to permit subrogation by the State with respect to claims against the City's consultants and contractors.

3. Contract Award and Construction

- 3.1. **Bids and Award.** The Owner will advertise for technical and price proposals and award a design-build contract to the "Best Value Proposer" for DTA Project No. 010-12-0043.3 according to the DTA Request for Proposal (RFP) documents, which are on file in the office of the DTA, and incorporated into this Agreement by reference. ("Project Plans")

acknowledges that the State is not acting as its employee, agent, servant, partner, joint venture, or co-principal with respect to the construction of the Project, or the ownership or operation of any contaminated properties. Notwithstanding the foregoing, this Agreement will not be construed to relieve the State of liability it may have, under applicable laws, with regard to the release or threatened release of pollutants, contaminants, and hazardous wastes existing in the trunk highway right-of-way and not caused by the City. The City will remain liable for the release or threatened release of pollutants, contaminants, and hazardous wastes existing in the trunk highway right-of-way, to the extent caused by the City.

6. Performance of Oversight Engineering

- 6.1.** The State will perform oversight engineering on that portion of the DTA Project involving the reconstruction of the Northwest Passage Skywalk (Bridge No. 69509) over the State's trunk highway right-of-way as required by the FHWA Stewardship Agreement pertaining to work by local agencies on the National Highway System.
- 6.2.** Oversight engineering will consist of the following items which impact the National Highway System.
 - A.** Review and approval of the final design-build bridge plans for the Northwest Passage Skywalk (Bridge No. 69509).
 - B.** Review, approve and provide concurrence of all work orders, change orders and supplemental agreements.
 - C.** Review of documented design-build contract quantities, inspection and materials testing.
 - D.** Periodic construction inspections.
 - E.** Review traffic control.
 - F.** Periodically attend weekly meetings.
 - G.** Review contractor's schedules.
 - H.** Review/approval of any closures of lanes on Interstate Trunk Highway No. 35.
 - I.** Any other oversight engineering duties required by the Federal Highway Administration, and/or the State.
- 6.3.** At any time before the parties agree on a time schedule, either the Owners or the State may terminate this agreement. Termination of the agreement must be accomplished by serving a written notice upon the other's authorized agent.

7. Operation and Maintenance by the City

Upon completion of the Project, the City will become the owner of and provide for the operation, maintenance, repair, reconstruction and replacement of the Northwest Passage Skywalk (Bridge No. 69509) and all associated facilities constructed under the Project as follows, without cost or expense to the State.

- 7.1. *Northwest Passage Skywalk (Bridge No. 69509).*** Inspect, maintain, repair, reconstruct and replace the Northwest Passage Skywalk (Bridge No. 69509) and associated facilities according to accepted City maintenance practices to perpetuate the facilities in a safe, usable and aesthetically acceptable condition.
- 7.2. *Commercial Activities.*** No commercial activities will be allowed in the Northwest Passage Skywalk (Bridge No. 69509) within the limits of the State's trunk highway right-of-way.
- 7.3. *Advertising devices.*** No advertising devices in any form or size will be constructed, placed or permitted to be constructed or placed within, upon, attached to or suspended from the Northwest Passage Skywalk (Bridge No. 69509) within the limits of the State's trunk highway right-of-way.
- 7.4. *Interstate Trunk Highway No. 35 Signage.*** The State will retain the right to attach to and/or suspend from the Northwest Passage Skywalk (Bridge No. 69509) traffic signs and/or other traffic control devices in a manner consistent with sound engineering practices that will not significantly detract from the integrity of

3.2. Contract Terms. The Owner's design-build contract with its construction contractor(s) must include a clause requiring the State to be named as an additional insured on any insurance coverage which the contractor is required to provide.

3.3. Direction, Supervision and Inspection of Construction

- A. The design-build construction of Bridge No. 69509 will be under the direction of the City and under the supervision of a registered professional engineer; however, the Northwest Passage Skywalk (Bridge No. 69509) construction covered under this Agreement will be open to inspection by the State District Engineer's authorized representatives. All design-build construction will be performed according to the Owner's Request for Proposals, the Contractor's technical proposal, and approved plans. The City will give the District Engineer at Duluth five days' notice of its intention to start the design-build construction.
- B. Responsibility for the control of materials for the Northwest Passage Skywalk (Bridge No. 69509) construction will be on the Owner and its contractor and will be carried out according to Specifications No. 1601 through and including No. 1609 in the State's current "Standard Specifications for Construction".

3.4. Completion of Construction. The City will cause the design-build construction to be started and completed according to the time schedule in the design-build contract. The completion date for the contract construction may be extended, by an exchange of letters between the appropriate City official and the State District Engineer's authorized representative, for unavoidable delays encountered in the performance of the contract construction.

3.5. Plan Changes. The State will not participate in the cost of any design-build contract construction. All changes in the Project Plans for the Northwest Passage Skywalk (Bridge No. 69509) and all addenda, change orders and supplemental agreements entered into by the Owner and its contractor for the Northwest Passage Skywalk (Bridge No. 69509) construction must be approved in writing by the State District Engineer's authorized representative

3.6. Compliance with Laws, Ordinances, Regulations. The City will comply and cause its contractor to comply with all Federal, State and Local laws, and all applicable ordinances and regulations.

4. Right-of-Way; Easements; Permits

- 4.1. The Owner will, without cost or expense to the State, obtain all rights-of-way, easements, construction permits and any other permits and sanctions that may be required in connection with the local and trunk highway portions of the design-build construction.
- 4.2. The Owner will convey to the State by quit claim deed, all newly acquired rights needed for the continuing operation and maintenance of the Trunk Highway, if any, upon completion of the Project, at no cost or expense to the State.
- 4.3. The City will comply with Minnesota Statutes § 216D.04, subdivision 1(a), for identification, notification, design meetings and depiction of utilities affected by the design-build construction.
- 4.4. The City will submit to the State's Utility Engineer an original permit application for all utilities owned by the City of Duluth to be constructed upon and within the trunk highway right-of-way. Applications for permits will be made on State form "Application for Utility Permit on Trunk Highway Right Of Way" (Form TP2525).

5. State's Role; City Assumes Environmental Liability

In performing its engineering oversight obligations under this design-build contract, the State is acting only as a contractor to the City, performing services required by the FHWA and prescribed by the City. The City acknowledges that the State is acting as its "Contractor" as defined in Minnesota Statutes §115B.03 (subd. 10), and as such is entitled to all applicable protections from liability for environmental conditions afforded by the Minnesota Environmental Response and Liability Act (Minnesota Statutes chapter 115B). The City

the Northwest Passage Skywalk (Bridge No. 69509) design aesthetics. Such traffic signs and/or other traffic control devices would be installed and maintained by the State without cost or expense to the City.

- 7.5. *Future Responsibilities.*** Upon completion of the Northwest Passage Skywalk (Bridge No. 69509) construction over Interstate Trunk Highway No. 35, the City will retain ownership of the bridge and accept full and total responsibility and all obligations and liabilities arising out of or by reason of the use, operation, maintenance, repair, reconstruction and replacement of the Northwest Passage Skywalk (Bridge No. 69509) and all of the facilities constructed as part of this Agreement, without cost or expense to the State.
- 7.6. *Related Agreements.*** This agreement will supersede and terminate the operation and maintenance terms of Agreement No. 58358, dated September 15, 1976, between the State and the City for the pedestrian concourse Bridge No. 69509.

8. Inspection and Maintenance by the State

Upon completion of the Project, the State will perform periodic inspections of that part of the Northwest Passage Skywalk (Bridge No. 69509) over the trunk highway right-of-way and inform the City of any required maintenance to be performed as a result of said inspections. If the City fails to perform the required maintenance within six months, the State will perform said maintenance and invoice the City for all maintenance costs incurred.

9. Authorized Representatives

Each party's Authorized Representative is responsible for administering this Agreement and is authorized to give and receive any notice or demand required or permitted by this Agreement.

9.1. The State's Authorized Representative will be:

Name/Title: Maryanne Kelly-Sonnek, Municipal Agreements Engineer (or successor)
 Address: 395 John Ireland Boulevard, Mailstop 682, St. Paul, MN 55155
 Telephone: (651) 366-4634
 Fax: (651) 366-4769
 E-Mail: maryanne.kellysonnek@state.mn.us

9.2. The City's Authorized Representative will be:

Name/Title: Cari Pedersen, Chief Transportation Engineer (or successor)
 Address: 211 City Hall, 411 West First Street, Duluth, MN 55802
 Telephone: (218) 730-5200
 E-Mail: cpedersen@duluthmn.gov

9.3. The DTA's Authorized Representative will be:

Name/Title: Jim Heilig, Director of Administration (or successor)
 Address: 2402 West Michigan Street, Duluth, MN 55806
 Telephone: (218) 722-7283
 E-Mail: jheilig@duluthtransit.com

10. Assignment; Amendments; Waiver; Contract Complete

- 10.1. *Assignment.*** No party may assign or transfer any rights or obligations under this Agreement without the prior consent of the other parties and a written assignment agreement, executed and approved by the same parties who executed and approved this Agreement, or their successors in office.
- 10.2. *Amendments.*** Any amendment to this Agreement must be in writing and will not be effective until it has been executed and approved by the same parties who executed and approved the original Agreement, or their successors in office.

10.3. Waiver. If a party fails to enforce any provision of this Agreement, that failure does not waive the provision or the party's right to subsequently enforce it.

10.4. Contract Complete. This Agreement contains all prior negotiations and agreements between the State, DTA and City. No other understanding regarding this Agreement, whether written or oral, may be used to bind the parties.

11. Liability; Worker Compensation Claims; Insurance

11.1. Each party is responsible for its own acts, omissions and the results thereof to the extent authorized by law and will not be responsible for the acts and omissions of others and the results thereof. Minnesota Statutes § 3.736 and other applicable law govern liability of the State. Minnesota Statutes Chapter 466 and other applicable law govern liability of the DTA and City. Notwithstanding the foregoing, the DTA and City will indemnify, hold harmless, and defend (to the extent permitted by the Minnesota Attorney General) the State against any claims, causes of actions, damages, costs (including reasonable attorneys fees), and expenses arising in connection with the Project covered by this Agreement, regardless of whether such claims are asserted by the Owner's contractor(s) or consultant(s) or by a third party because of an act or omission by the DTA or City or their contractor(s) or consultant(s).

11.2. Each party is responsible for its own employees for any claims arising under the Workers Compensation Act.

11.3. The Owner may require its contractor to carry insurance to cover claims for damages asserted against the Owner's contractor.

12. Nondiscrimination

Provisions of Minnesota Statutes § 181.59 and of any applicable law relating to civil rights and discrimination are considered part of this Agreement.

13. State Audits

Under Minnesota Statutes § 16C.05, subdivision 5, the DTA's and City's books, records, documents, and accounting procedures and practices relevant to this Agreement are subject to examination by the State and the State Auditor or Legislative Auditor, as appropriate, for a minimum of six years from the end of this Agreement.

14. Government Data Practices

The DTA, City and State must comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to all data provided under this Agreement, and as it applies to all data created, collected, received, stored, used, maintained, or disseminated by the DTA or City under this Agreement. The civil remedies of Minnesota Statutes §13.08 apply to the release of the data referred to in this clause by the DTA, City or State.

15. Governing Law; Jurisdiction; Venue

Minnesota law governs the validity, interpretation and enforcement of this Agreement. Venue for all legal proceedings arising out of this Agreement, or its breach, must be in the appropriate state or federal court with competent jurisdiction in Ramsey County, Minnesota.

16. Termination; Suspension

16.1. By Mutual Agreement. This Agreement may be terminated by mutual agreement of the parties.

16.2. Suspension. In the event of a total or partial government shutdown, the State may suspend this Agreement and all work, activities and performance of work authorized through this Agreement.

17. Force Majeure

No party will be responsible to the other parties for a failure to perform under this Agreement (or a delay in performance), if such failure or delay is due to a force majeure event. A force majeure event is an event beyond a party's reasonable control, including but not limited to, unusually severe weather, fire, floods, other acts of God, labor disputes, acts of war or terrorism, or public health emergencies.

CITY OF DULUTH

The undersigned certify that they have lawfully executed this contract on behalf of the Governmental Unit as required by applicable charter provisions, resolutions or ordinances.

By: _____
(Mayor)

Date: _____

Attested: _____
(City Clerk)

Date: _____

Approved as to form:

By: _____
(City Attorney)

Date: _____

Countersigned: _____
(City Auditor)

Date: _____

INCLUDE COPY OF RESOLUTION APPROVING THE AGREEMENT AND AUTHORIZING ITS EXECUTION.

DULUTH TRANSIT AUTHORITY

The undersigned certify that they have lawfully executed this contract on behalf of the Governmental Unit as required by applicable charter provisions, resolutions or ordinances.

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

DEPARTMENT OF TRANSPORTATION

Recommended for Approval:

By: _____
(District Engineer)

Date: _____

Approved:

By: _____
(State Design Engineer)

Date: _____

COMMISSIONER OF ADMINISTRATION

By: _____
(With delegated authority)

Date: _____

INCLUDE COPY OF RESOLUTION APPROVING THE AGREEMENT AND AUTHORIZING ITS EXECUTION.

MKS